

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Falcon Cable Systems Company II, a California)	File Nos. CSR 5678-E Thru CSR 5689-E
Limited Partnership, d/b/a Charter Communications)	
)	
Petitions for Determination of Effective)	
Competition in Twelve Oregon Cities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 2002

Released: March 15, 2002

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Falcon Cable Systems Company II, a California Limited Partnership, d/b/a Charter Communications ("Charter"), has filed with the Commission twelve petitions¹ pursuant to Sections 76.7 and 76.907 of the Commission's rules for determinations of effective competition in each of the twelve Oregon communities listed on Attachment A (the "Communities"). Charter alleges that its cable systems serving these communities are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act"),² and the Commission's implementing rules,³ and are therefore exempt from cable rate regulation. More particularly, Charter claims the presence of effective competition in the twelve Communities stems from the competing services provided by two unaffiliated direct broadcast satellite ("DBS") providers, Direct TV, Inc. ("DirectTV") and EchoStar Communications Corporation (EchoStar"). Charter claims it is subject to effective competition in these twelve communities under the "competing provider" effective competition test set forth in Section 623(1)(1)(B) of the Communications Act.⁴ The Regional Cable Commission ("RCC"), an entity of the Lane County, Oregon Council of Government, filed oppositions to the petitions on behalf of each community, and Charter filed replies to the oppositions. Charter also submitted a supplement to each of the petitions.

¹See Public Notice, Cable Services Bureau Registrations; Special Relief and Show Cause Petitions, Report No. 1306, dated May 4, 2001.

²47 U.S.C. § 543(1).

³47 C.F.R. § 76.905(b)(4).

⁴See 47 U.S.C. § 543(1)(1)(B), which sets forth the "competing provider" effective competition test.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(1) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁷ Section 623(1) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.⁸ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.⁹

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent (15%) of the households in the franchise area.¹⁰ Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.¹¹ Charter states that its service is also offered to more than 50 percent of the households in each franchise area. In addition, Charter has provided evidence of the advertising of DBS service in national and local media serving the franchise areas.¹² With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹³ We find that Charter has demonstrated that the twelve Oregon Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter holds non-exclusive franchises issued by each of the twelve Communities to provide cable services in each of those Communities. Charter provided 1990 U. S. Census data showing the number of households for each of the Communities. Charter provided subscribership data showing that its subscribership exceeds the aggregate total of DBS subscribers in each of the Communities. These data,

⁵47 C.F.R. § 76.906.

⁶See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁷See 47 C.F.R. §§ 76.906 & 907.

⁸See 47 U.S.C. § 543(1)(1)(A)-(D).

⁹See 47 C.F.R. § 76.905.

¹⁰47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

¹¹See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹²See Petitions at 2-4 and Exhibit 1.

¹³See 47 C.F.R. § 76.905(g). *See also* Charter Petitions at 2-3 and Exhibit 1. Each Exhibit 1 includes channel line ups for Charter's cable systems serving these Communities as well as those of Direct TV and EchoStar.

summarized on Attachment A, show that the number of Charter subscribers exceeds the number of DBS subscribers in each of these Communities and thus demonstrate that Charter is the largest MVPD in each of these Communities.¹⁴

5. Charter also provided information in the petitions showing that in the twelve Communities the DBS and other MVPD providers collectively have attained subscriber penetration levels that range from 19 percent in Oakridge, Oregon, to 48 percent in Westfir, Oregon.¹⁵ The RCC contends that these DBS penetration rates are based on 1990 household data and current subscriber levels and therefore are unreliable. The RCC suggests that any determination of penetration rates must await release of 2000 Census household data, noting the state-wide population growth rate in excess of 20% during the 1990's and ranging from 47.2% in Cresswell, Oregon to a loss of 0.7% in Westfir, Oregon.¹⁶ The supplements submitted by Charter provide updated penetration rate information that is based on recently released 2000 Census household data. This updated Census household data confirms that DBS penetration rates exceed the statutory 15% level in each community, with penetration levels ranging from 17.4% in Oakridge to 47% in Westfir. Based on this record, we find that Charter has satisfied the second prong of the competing provider test in these twelve Communities.

6. The RCC further contends that the process used by Sky Trends to determine DBS subscribership in the communities is faulty. The RCC argues that the subscriber postal zip code data used in the process does not correspond to the respective community, or franchise area, under consideration. The RCC notes that in virtually every case the franchise area makes up only a portion of the area described by the zip code. For that reason, the RCC claims the zip code data includes subscribers located outside the community in the penetration rate calculation, thus improperly inflating the resulting penetration rates. The RCC further argues that the process stemming from use of zip plus four zip codes is misleading and does not have the precision claimed by Charter, pointing out that zip codes other than zip plus four zip codes were in fact used. The RCC contends that use of the other zip codes, which define areas more broadly than zip plus four zip codes, virtually assured that subscribers located outside the communities were counted.

7. Charter provided in reply a Sky Trends description of how zip codes are used to identify DBS subscribers within communities named by cable operators for purposes of the statutory effective competition tests.¹⁷ A zip plus four zip code rather precisely identifies mail delivery areas by city block, office or apartment building, group of streets, or group of post office boxes.¹⁸ The Sky Trends program associates subscribers having zip plus four zip codes with specific set of geographic coordinates within the delivery area. Subscribers having zip codes associated with coordinates lying within a named community are deemed to be located within the named community.¹⁹ We find this method of determining

¹⁴Petitions at 4-5 and Exhibit 2. 1990 U. S. Census data satisfy effective competition decision requirements. *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Cable Service Rates*, 9 FCC Rcd 3656 (1994). *See also* Charter letters, dated May 9, 2001, supplementing the information submitted with the petitions.

¹⁵Petitions at 4-5 and Exhibit 2 & 3. The penetration rate for each of the Communities is set forth on Attachment A.

¹⁶Oppositions at 4-5.

¹⁷SkyTRENDS makes DBS satellite subscriber information data publicly available, but not separately for each DBS provider. Charter Replies at 2-4.

¹⁸*Id.* at 3, n. 6 & Exhibit A.

¹⁹*Id.*

DBS subscribers within a franchise area to be reasonable and sufficiently reliable for purposes of determining the presence of effective competition. With respect to two other zip code formats that define mail delivery areas more broadly, the Sky Trends program determines the geographic center of the zip code area. In instances where the zip code geographic center lies within a named community, the program deems the subscribers within that zip code to be located within the named community.²⁰ While the level of accuracy in these instances necessarily varies with the shape and size of the zip code area, we accept the Sky Trends data presented by Charter because it is the best available source for determining DBS subscribership in such zip code areas.²¹ The RCC has failed to offer a better alternative.

8. Finally, the RCC asks for modification of the standard for determining effective competition and argues that Charter relies on an inappropriate extension of prior Commission rulings on what constitutes effective competition. The RCC notes that, while the 1996 Telecommunications Act²² effected certain modifications of cable rate regulation, local franchise authority to review basic service tier rates was retained. The RCC contends that many of the assumptions underlying that legislation about what would likely happen in the cable television market have not occurred. The RCC asserts that one of the assumptions was that DBS would provide “local-into-local” services pursuant to the voluntary provision set out in the Satellite Home Viewer Improvement Act of 1999.²³ The RCC contends, however, that local television stations are not being carried into local markets in many rural areas such as those represented by the Oregon communities involved in this case. Additionally, the RCC notes that neither Section 76.905(g) of the Commission’s regulations²⁴ nor Section 623(1)(1)(B)(i) of the statute²⁵ defines “comparable video programming.” For these reasons, the RCC requests that the standard for determination of effective competition be modified to focus on the basic services tier that has not been deregulated and to require a two part showing: (1) that at least one DBS competitor has elected to provide local-into-local service for the franchise area and (2) that the DBS service carries comparable channels to that of the local cable system. Absent such modification, the current standard improperly determines only whether competition may exist in segments of cable services already deregulated by the 1996 Telecommunications Act, according to the RCC.²⁶

9. We decline to modify the standard for determination of effective competition as requested by the RCC. Aside from prohibitions against using this adjudicatory proceeding for substantively modifying the standard for determining effective competition, we note that the Commission has determined previously that an offering of at least twelve channels of programming, including at least one channel of non-broadcast service programming, should ensure that an alternate source of programming “is competitively comparable to a minimum basic tier service that an incumbent cable operator could offer.”²⁷ In adopting this standard, the Commission rejected suggestions that comparable

²⁰ *Id.*

²¹ Contrary to Charter’s suggestion, *In re Petition of Texas Cable Partners, L.P.*, 16 FCC Rcd 4886 (CSB 2001), presented no need to evaluate SkyTrends data in the detail considered here.

²² Pub. L. No. 104-104, 110 Stat. 56 (1996)

²³ Pub. L. No. 106-113, 113 Stat. 1501 (1999).

²⁴ 47 C.F.R. § 76.905(g).

²⁵ 47 U.S.C § 543(1)(1)(B)(i).

²⁶ Oppositions at 5-9.

²⁷ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5666 (1993).

content in categories of programming be required, noting that such a requirement would place it in the difficult position of comparing the quality and content of programming offered.²⁸ In our view, requiring DBS providers to offer local-into-local service as a prerequisite to a finding of effective competition would involve making comparisons of programming quality and content the Commission has expressly declined to undertake. It may be noted also that the DBS providers offer more than 45 channels of programming, which substantially exceeds the minimum amount of programming channels required under the current standard.²⁹ Finally, a petition for rulemaking is the appropriate vehicle for requesting such rule changes and not an opposition filed in a proceeding initiated pursuant to Section 76.7 of the Rules.

10. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the twelve Oregon Communities listed on Attachment A are subject to effective competition.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the captioned petitions for a determination of effective competition filed by Falcon Cable Systems Company II, a California Limited Partnership, d/b/a Charter Communications **IS GRANTED**.

12. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.³⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁸ *Id.* at 5665.

²⁹ Petitions at Exhibit 1.

³⁰ 47 C.F.R. §0.321.

ATTACHMENT A
TWELVE OREGON COMMUNITIES SERVED BY

Falcon Cable Systems Company II, a California Limited Partnership, d/b/a Charter Communications

<u>Oregon Community</u>	<u>CUID Nos./ File Nos.</u>	<u>Households</u>		<u>DBS Subscribers</u>	<u>DBS Penetration</u>		<u>Charter Subscribers</u>
		<u>1990</u>	<u>2000*</u>		<u>1990**</u>	<u>Revised***</u>	
Bay City	OR0086 CSR 5683-E	441	493	121	27%	24.54%	379
Brownsville	OR0214 CSR 5688-E	481	535	184	38%	34.39%	306
Coberg	OR0176 CSR 5689-E	293	367	74	25%	20.16%	126
Cottage Grove	OR0340 CSR 5682-E	2802	3264	742	26%	22.73%	1584
Creswell	OR0321 CSR 5681-E	886	1271	301	34%	23.68%	566
Drain	OR0052 CSR 5680-E	366	397	169	46%	42.57%	284
Garibaldi	OR0087 CSR 5684-E	386	436	118	32%	27.06%	355
Lowell	OR0206 CSR 5678-E	271	315	85	31%	26.98%	207
Oakridge	OR0079 CSR 5685-E	1250	1345	235	19%	17.47%	917
Veneta	OR0209 CSR 5679-E	904	966	255	28%	26.40%	601
Westfir	OR0248 CSR 5686-E	98	100	47	48%	47.00%	119
Yoncalla	OR0202 CSR 5687-E	351	409	102	29%	24.94%	234

*2000 Census households.

**DBS penetration rates using 1990 Census households data.

***DBS penetration rates using 2000 Census households data.